No. 02-1461

(2)

Supreme Court, U.S.
FILED
MAY 2 2003
OFFICE OF THE CLERK

IN THE

United States Supreme Court

OCTOBER TERM, 2002

CHRISTOPHER F. SHERIDAN,

Petitioner,

v.

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Respondent.

On Petition For A Writ of Certiorari
To The Appellate Division of the Supreme Court of the State of New York,
First Judicial Department

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TOBACK, HYMAN & BERNSTEIN, LLP
Counsel of Record for Respondent
500 5th Avenue, Suite 1640
New York, New York 10110
212-869-2300

57 pp

ISSUES PRESENTED

1. Whether the Equal Protection and Due Process Clauses of the United States Constitution are applicable to the purely private conduct of Columbia University, a private institution and non-state actor?

2. Whether petitioner Christopher F. Sheridan (hereinafter "Petitioner") may seek certiorari of a federal question, which was not addressed or raised in the State Court proceedings?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent, The Trustees of Columbia University in the City of New York is a private not for profit corporation with no private or publicly held company owning 10% or more of its stock.

TABLE OF CONTENTS

	Page
Issues Presented	i
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Authorities	v
Counter-Statement of the Case	1
Summary of the Argument	3
Reasons for Denying the Writ	3
Point A NO FEDERAL QUESTION WAS TIMELY OR PROPERLY RAISED BY PETITIONER IN THE STATE COURT PROCEEDING	3
Point B COLUMBIA UNIVERSITY IS NOT A STATE ACTOR AND ITS ACTIONS INVOLVE MERELY PRIVATE CONDUCT	5
Conclusion	9
Appendices	
Appendix A Affirmation of James H. Rodgers, affirmed February 18, 2000 (Record, Pages 53-55)	1a

		Page
Appendix B	Columbia University Student Loan Promissory Note dated October 31, 1981 (Record, Pages 50-51)	4a
Appendix C	Petitioner's Notice of Motion for Leave to Appeal to the New York State Court of Appeals and Relevant Portions of Supporting Affirmation including Questions Presented section.....	9a
Appendix D	Relevant Portions of Petitioner's Brief on Appeal to the Appellate Division, First Department including Table of Contents, Table of Authorities, Preliminary Statement and Questions Presented sections	14a
Appendix E	Relevant Portions of Petitioner's Reply Brief to the Appellate Division, First Department including Table of Contents and Table of Authorities sections	24a
Appendix F	Petitioner's Notice of Motion for Reargument or In Alternative for Leave to Appeal to the Court of Appeals and Relevant Portions of Supporting Affirmation	30a

TABLE OF AUTHORITIES

Cases	Page
Adams v. Robertson, 520 U.S. 83 (1997)	4
Albert v. Carovano, 851 F.2d 561 (2d Cir. 1988)	7
Blum v. Yaretsky, 457 U.S. 991, 1002 (1982)	6, 7
Civil Rights Cases, 109 U.S. 3 (1883)	6
Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)	7
Odom v. Columbia University, 906 F. Supp. 188 (S.D.N.Y. 1995)	8
Polk County v. Dodson, 454 U.S. 312 (1981)	7
Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982)	6, 7
Rothman v. Emory University, 828 F. Supp. 537 (N.D.Ill. 1993)	7
Shelley v. Kraemer, 334 U.S. 1, 13 (1948)	6
Sheridan v. Columbia University, 745 N.Y.S.2d 18, 2002 N.Y. Slip. Op. 05530 (1st Dep't 2002)	2
Smith v. Duquesene University, 612 F. Supp. 72 (W.D.P.A. 1985), *aff'd.*, 787 F.2d 583 (3rd Cir. 1986)	8
Street v. New York, 394 U.S. 576 (1969)	4
Webb v. Webb, 451 U.S. 493 (1981)	4, 5

Statutes and Other Authorities:

Rules of the Supreme Court of the United States
§ 14(1)(g)(i) 4, 5

New York State Education Law § 219(4) 7

New York State Education Law § 224(4) 7

COUNTER-STATEMENT OF THE CASE

Petitioner was an undergraduate student at The Trustees of Columbia University in the City of New York (hereinafter "Columbia University") at the School of General Studies during the period 1988 through 1990 and received his Bachelor of Arts degree in October 1990. Petitioner's education at Columbia University was funded primarily by means of financial aid and student loans[1]. At the time he graduated and received his degree, Petitioner acknowledges and admits that he had "a continuing balance owed to Columbia University in the amount of $22,706.16"[2]. Separate and apart from the outstanding tuition that Petitioner admits owing to Columbia University, Petitioner remains in default of a certain promissory note between Columbia University as lender and Petitioner as borrower, dated October 31, 1989 in the face amount of $3,000 (the "Promissory Note"). The relevant student bulletins in effect during Petitioner's association with Columbia University (the "Student Bulletin"), provide in pertinent part:

> It is the policy of the University to withhold registration, privileges, diplomas, certificates and transcripts until all financial obligations have been met.

Similarly, the express terms of the Promissory Note executed by the Petitioner provided, in relevant part, "if I [Sheridan] fail to fulfill any of my obligations described in this [Promissory] Note, Columbia University may with-

---

[1] Although not relevant to the Application, the Petition contains facts allegedly pertaining to Petitioner's family members or their employment history, which are not contained in the Record.

[2] Appellate Division Record at page 54, paragraph 5 provided at Appendix A, page 2a.

hold any rights and privileges to which I may otherwise be entitled, including registration for study and receipts of diplomas and transcripts"[3]. Based upon the express provisions of the Student Bulletin and Promissory Note, and based further upon Petitioner's unpaid (and admitted) financial obligations owing to Columbia University, Columbia University exercised its right to withhold Petitioner's transcript.

Petitioner filed a Complaint alleging, *inter alia*, that Columbia University was prohibited from withholding his transcript and the Appellate Division, First Department modified, in part, and otherwise affirmed New York Supreme Court's prior Orders and dismissed Petitioner's Complaint in its entirety. See *Sheridan v. Columbia University*, 745 N.Y.S.2d 18, 2002 N.Y. Slip. Op. 05530 (1st Dep't 2002)[4]. By Order dated October 8, 2002, the Appellate Division, First Department, denied plaintiff's motion for re-argument and motion for leave to appeal to the New York Court of Appeals[5].

By Order dated January 9, 2003, the New York Court of Appeals denied Petitioner's Motion for Leave to Appeal to the Court of Appeals[6].

---

[3] Appellate Division Record at page 50, paragraph 6 provided at Appendix B, page 6a.

[4] A copy of the Appellate Division, First Department's Decision and Order entered July 2, 2002 is provided with the Petition, App. 1, pages 1a - 4a.

[5] A copy of the Appellate Division, First Department's Order entered October 8, 2002 is provided with the Petition, App. 2, pages 4a - 5a.

[6] A copy of the Court of Appeals' Order entered January 9, 2003 is provided with the Petition, App. 3, page 6a.

SUMMARY OF THE ARGUMENT

Petitioner's application for a Writ of Certiorari must be denied because: (a) the federal constitutional issues asserted by Petitioner herein were not raised, or addressed, in the State Court proceedings and (b) Petitioner's Due Process and Equal Protection claims, raised here for the first time, are not implicated for purely private conduct—Columbia University is a private institution and not a "state actor".

REASONS FOR DENYING THE WRIT

A. NO FEDERAL QUESTION WAS TIMELY OR PROPERLY RAISED BY PETITIONER IN THE STATE COURT PROCEEDINGS

Petitioner's application for a Writ of Certiorari must be denied because the federal constitutional issues raised in his Petition were not raised below or preserved for appellate review. *Street v. New York*, 394 U.S. 576 (1969); *Adams v. Robertson*, 520 U.S. 83 (1997).

This Court has long held that its jurisdiction to re-examine the final judgment of a State court can only arise if the Record as a whole shows that the federal claim was adequately presented in the State's system. *Webb v. Webb*, 451 U.S. 493 (1981). This Court has consistently refused to decide purported federal constitutional issues raised here for the first time on review of State court decisions. *Id.* When the highest State court is silent on a federal question before this Court, it is assumed that the issue was not properly presented and the aggrieved party bears the burden of

defeating this assumption—a burden that Petitioner has failed to sustain. See *Adams*, 520 U.S. at 87.

This principle has been codified in this Court's Rule § 14(1)(g)(i), which states, with respect to the contents of a Petition for Writ of Certiorari, that it shall contain the following:

> (i) If review of the state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific references to the places in the record where the matter appears . . . , so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Rules of the Supreme Court of the United States, Rule 14(1)(g)(i).

The Petition herein does not and cannot comply with this Rule because, despite the initial proceeding in the court of first instance and three appeals to the State appellate courts, the Record fails to disclose any Due Process or Equal Protection claims raised or framed by Petitioner. In fact, in all the appellate briefs filed below by Petitioner, no reference or citation is made to the Fourteenth Amendment or United States Constitution. Moreover, in all of the State Court appeals, the statements of questions presented do not address or refer to the Fourteenth Amendment or the

United States Constitution; and as such, the Petitioner failed to timely and properly raise any federal question that this Court could review[7]. Essentially, Petitioner seeks to have this Court review and interpret the New York State Education Law and Columbia University's charter, each of which raise questions purely of state law not properly subject to review before this Court. *Webb*, 451 U.S. at 494[8].

B. COLUMBIA UNIVERSITY IS NOT A STATE ACTOR AND ITS ACTIONS INVOLVE MERELY PRIVATE CONDUCT

Petitioner's application for a Writ must also be rejected for a further separate and distinct reason. Columbia University is a private institution and is not a "state actor". As this Court stated in *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982),

> [S]ince this Court's decision in the Civil Rights Cases, 109 U.S. 3 (1883), "the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth

[7] The Table of Contents, Table of Authorities and Statements of Questions Presented sections of Petitioner's briefs filed below are provided herein at Appendices C, D, E and F, respectively.

[8] Petitioner's argument concerning improper judicial state action is similarly unavailing because it rests on a fundamental flaw—*to wit*, that Petitioner's suggested distinction between a degree holder, graduate and student is correct. The Appellate Division expressly rejected this argument and now Petitioner claims that the Appellate Division's reading of the state statute has created an infringement of Petitioner's constitutional rights. The application by the state court of the state rule of law does not offend or even implicate the Fourteenth Amendment and Petitioner cannot be entitled to this Court's review merely because the Appellate Division did not accept his interpretation.

> Amendment is only such action as may fairly be said to be that of the States." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). "That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

The ultimate issue in determining whether a person may be subject to suit under the Fourteenth Amendment is whether the alleged infringement of federal rights is fairly attributable to the State. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982). As we show below, Columbia University's act of withholding the Petitioner's transcript on the basis of his admitted outstanding tuition debt owed to Columbia University is not attributable to the State, and consequently, Petitioner's constitutional claim must necessarily fail.

In *Blum* and *Rendell-Baker* this Court held that "a State normally can be held responsible for a private decision ***only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State***." *Rendell-Baker*, 457 U. S. at 840 (emphasis added). In this case, Petitioner attempts to argue that Columbia University should be considered a "state actor" because the State, via New York State Education Law § 224(4), granted to all "regularly organized institutions of learning" the power to confer a degree upon individuals "meeting all requirements of law and of the university"[9] and further because New York State Education Law § 219(4) requires that college trustees, upon dissolution of a college or university, file the permanent academic

[9] Petition, pages 20-21.

records with the New York State Department of Education[10]. These examples of State delegated authority or regulation neither amount to the State's exercise of coercive power over Columbia University nor do they demonstrate a sufficiently close nexus between the State and Columbia University so that Columbia University's action of withholding Petitioner's transcript may be fairly treated as that of the State. *Rendell-Baker*, 457 U.S. at 840; *Blum*, 457 U.S. at 1004.

This Court has chosen not to recognize a private entity to be a "state actor" in far more heavily government controlled or regulated instances including *Blum*, *supra*, (extensively State regulated private nursing home held not a "state actor"); *Rendell-Baker*, *supra*, (private educational institution funded by State public funds and regulated by State held not a "state actor"); *Polk County v. Dodson*, 454 U.S. 312 (1981) (State Public Defender held not a "state actor"); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (private club subject to Pennsylvania Liquor Control Board regulation held not a "state actor"). See also, *Albert v. Carovano*, 851 F.2d 561 (2d Cir. 1988) (private college's disciplinary actions, even though in compliance with State statute "cannot be state action"); *Rothman v. Emory University*, 828 F. Supp. 537 (N.D.Ill. 1993). (dismissed claim because private college is not a "state actor"); *Smith v. Duquesene University*, 612 F. Supp. 72 (W.D.P.A. 1985), *aff'd.*, 787 F.2d 583 (3rd Cir. 1986) (dismissed State action claim against private university).

Most recently, the District Court for the Southern District of New York held that Columbia University is a

---

[10] *Id.*

private institution and not a state actor. *Odom v. Columbia University*, 906 F. Supp. 188 (S.D.N.Y. 1995) ("Furthermore, such claim, even if alleged, could not survive a motion to dismiss because Columbia, as a private institution, does not act under color of state law").

Accepting Petitioner's argument that Columbia University must be considered an arm of the State because it is authorized by the State legislature to confer a degree upon its graduates, would necessarily broaden and extend the "state actor" characterization to all private colleges, private universities, and other private and parochial schools that are legislatively authorized to confer a degree or issue a diploma. Such a premise, urged here by Petitioner for the first time, is both wrong and contradicts this Court's century old interpretations of "state action" and the Fourteenth Amendment.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that this Court deny the Petition.

Dated: New York, New York
May 2, 2003

Respectfully submitted,

TOBACK, HYMAN & BERNSTEIN LLP
Brian K. Bernstein
Jerry A. Weiss
Counsel of Record
Attorneys for The Trustees of Columbia University in the City of New York
500 Fifth Avenue, Suite 1640
New York, New York 10110-0095
(212) 869-2300